Supreme Court, U.S.
FILED
98 2 0 18 APR 19 1999

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1998

Jennifer Oakley, Petitioner

vs.

Larry Arnold Wilson, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Jennifer Oakley, M.D., *pro se*
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(615)340-6510

QUESTION PRESENTED FOR REVIEW

Is it a violation of the Fourteenth Amendment of the U.S. Constitution and/or a violation of the essential and fundamental ethical principles set forth in Young v. United States ex Rel. Vuitton et Fils S.A., 481 U.S., 787, 107, S. Ct. 2124, 95 L. Ed. 2d 740, (1987) for a State Supreme Court to allow criminal contempt charges to be prosecuted by a private attorney who is representing the beneficiary of a court order in a civil case alleging a violation of that order?

PARTIES

The parties are petitioner, Jennifer Oakley (fka Wilson) and respondent, Larry Arnold Wilson.

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The Opinion of the highest state court to review the merits is the Tennessee Supreme Court and appears at Appendix A to the petition. The Opinion has been designated for publication but is not yet reported to the petitioner's knowledge.

JURISDICTION

The judgment of the Tennessee Supreme Court was entered in this action on 12/21/98. Jennifer Oakley's petition to rehear was denied on 1/19/99.

The jurisdiction of this Court is invoked pursuant to the Fourteenth Amendment and the supervisory authority with which it is vested, under Article III and Article VI, Section 2 of the U.S. Constitution, to determine the procedures to be employed by courts to enforce their orders.

28 U.S.C. 2403 (b) may apply and Certificate of Service is concomitantly served on the Attorney General of the State of Tennessee. The State Attorney General has previously filed an amicus curiae brief with the Tennessee Supreme Court in this case 8/10/98.

CONSTITUTIONAL PROVISIONS INVOLVED

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STATEMENT OF THE CASE

This is an action to determine if a citizen of the United States is protected under the umbrella of the rulings of U. S. Supreme Court as stated in the Fourteenth Amendment of the United States Constitution when a State Supreme Court rules in direct opposition to U.S. Supreme Court opinion. The petitioner is the alleged contemnor in two pending criminal contempt petitions filed by the defendant's attorney during divorce proceedings while financial settlement negotiations were being discussed. Each contempt petition requested ten days of incarceration of the petitioner, a parent of a minor and only child. In order to balance the scale of evidence presented, the petitioner filed a contempt action against the respondent.

Prior to the divorce hearing, the petitioner filed simultaneous motions for the recusal of the trial court alleging bias and for the disqualification of the respondent's private attorney as prosecutor on two separate occasions. All were denied. The petitioner secured an interlocutory and extraordinary appeal on the interested prosecutor question which incorporated all contempt petitions by the Tennessee Court of Appeals which eventually reversed the trial court. The respondent appealed to the Tennessee Supreme Court which reversed the Court of Appeals in an opinion which is in opposition to the previous holding in Young (supra) regarding the appointment of a disinterested attorney to prosecute criminal contempt charges arising from a civil case.

STATEMENT OF THE FACTS

The petitioner, Jennifer Oakley, is a physician in Nashville, Tennessee who filed for divorce in Davidson County in 6/96 . During the divorce proceedings certain restraining orders were issued by the court, and in 9/96 the respondent's attorney filed a petition for contempt against the petitioner alleging that she had violated an order of the trial court. Incarceration was requested as the respondent's relief.

In 10/96, the petitioner filed a motion requesting the notice of Constitutional Rights guaranteed to all charged with criminal actions and also filed a counterpetition against the respondent. The trial court so ordered. (Appendix E) The respondent reissued the criminal contempt petition attaching the notice of Constitutional Rights thereto. The petitioner then filed a motion for the trial court's recusal alleging bias and simultaneously filed a motion for disqualification of the private prosecutor alleging an inherent conflict of interest and denial of due process. Both were denied in 1/97 (Appendix F and G), however, an interlocutory appeal was granted on the private prosecutor question (Appendix H). The respondent filed another criminal contempt petition in 2/97.

The petitioner again filed simultaneous motions for recusal and for the disqualification of the private prosecutor. In 4/97, three days before the divorce hearing, the trial court denied both motions again although no order was ever signed to that effect. The morning of the divorce hearing, the Court of Appeals granted an extraordinary appeal (Appendix I) on the private prosecutor question incorporating all criminal contempt petitions. The divorce decree was signed in 5/97.

The Court of Appeals reversed the trial court on 3/20/98 relying heavily on the ethical, essential and fundamental principles required of the judiciary set forth in Young. They, however, asserted that Constitutional safeguards did not apply to criminal contempt proceedings as the charges were "quasi-criminal", "minor in nature", and should be reserved for instances when "more severe" punishment was possible. Further, they "avoided" the inherent due process question finding it "unwise and unnecessary to enter the quagmire." (Appendix B)

The petitioner, however, was forced to continue in the quagmire as the respondent proceeded to the Tennessee Supreme Court. On 12/21/98, the Tennessee Supreme Court reversed the Court of Appeals stating that they were not "constitutionally bound" to follow Young and "declined to adopt the rule of automatic disqualification" of an interested private prosecutor. Further they

asserted that, "in Tennessee", appointing a private attorney who represents the beneficiary of a court order to prosecute a criminal contempt action for an alleged violation of that order does not create an inherent or potential conflict of interest. Further, contrary to Young, they held that this practice does not create the appearance of impropriety. They asserted that since the judge actually determines whether a criminal contempt petition is issued, that this "judicial oversight ... virtually eliminates any danger that contempt actions will proceed if instituted for improper motives..." again contrary to Young. Finally they asserted "erroneously depriving (one) of his or her liberty interest ... is far outweighed by the very real fiscal and administrative burdens" unlike the federal system. (Appendix A) The mandate was issued in error, pending disposition of petitions to rehear and was recalled with requirement of notification of filing of Certiorari . (Appendix D) Petition to rehear was denied on 1/19/99. (Appendix C)

The petitioner proceeds *pro se*, having exhausted her funds, but relying on her faith in the judicial integrity of the country, seeking the assistance of this highest Court's supervisory authority.

REASONS FOR GRANTING CERTIORARI

1)The time has come to extend the Young ruling to the state courts.

The beloved, late U.S. Supreme Court Justice Blackmun noted in Young in an additional opinion concurring with the majority, that he "would go further, and hold that the practice - federal or state - of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." Young, p. 741. This question was visited some 12 years ago and should be resolved in accordance with Justice Blackmun's opinion.

The Tennessee Supreme Court notes that " surprisingly few state courts have addressed the issue in this appeal" noting that some state courts have followed Young with little or no analysis of the issue." (Appendix A)

Therefore, the time is ripe for the Supreme Court of the United States under its supervisory powers to direct all courts - federal and state -of their need to comply with due process requirements, equal protection of the law guarantees, and the ethical principles essential to the integrity of the judiciary.

2) The question is of nationwide impact.

Criminal contempt potentially affects every United States citizen under any order of any court. It is vital to the health of the judiciary to have a fundamentally fair process which reflects consistency and integrity.

3) The question is of nationwide importance.

All Americans are entitled to the safeguards of the Constitution, whether it be the alleged handbag imitators in Young, or just plain citizens who might be submerged in the often greedy dealings of divorce faced with feigned criminal contempt proceedings in order to negotiate a deal. The judicial process should protect all equally. Ten days loss of liberty for conviction of criminal contempt with imprisonment is nonetheless loss of irretrievable liberty.

4) The question is serious.

As noted by the Young Court on P. 763 : "Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." The petitioner asserts as a result of this case much time has been lost from her child and patients. Much money has been spent. Much stress has been needlessly endured. Had the state followed Young, this petition would not have been required. The effects on a professional license if convicted after being prosecuted by a partial prosecutor are obvious. And yet, unless the circumstance is resolved, any lawyer with a conflict of interest, anywhere, anytime can be given the power to prosecute criminal contempt arising out of civil litigation in flagrant violation of the Constitution, Young and the Canons of Ethics..

5) The Court has the authority to extend the Young ruling to the state courts and should.

"The exercise of the United States Supreme Court's supervisory authority is especially appropriate in the determination of the procedures to be employed by courts to enforce their orders." Young. p. 745 , Article III, Article VI , Section II of the U.S. Constitution. This authority coupled with the law of the Fourteenth Amendment of the U.S. Constitution allows and, in the petitioner's humble and respectful opinion, indicates that this Court should respond to this writ of certiorari. The petitioner asserts that the Tennessee Supreme Court has failed to follow the Young holding. In so doing, the Tennessee Supreme Court has abridged the privileges of the petitioner's U.S. citizenship thereby jeopardizing her liberty. Action on the question at bar is desperately needed.

CONCLUSION

As a physician, the *pro se* petitioner has had the privilege of intimately observing the phases of human life . There are many occurrences that are not understandable. The question in this petition is not one of them, and the American people deserve an answer.

Therefore,

in Honor, of Justice Blackmun and all other soldiers who have dedicated their lives to preserving this country's freedom,

in Service, to those of us who now labor with you to secure the blessings of liberty,

in Dedication, to those yet unborn who will be directed by these very core opinions long after this Court's departure,

the petitioner earnestly implores acceptance of this writ for certiorari- for all Americans- past, present and future.

Most respectfully resubmitted,

Jennifer Oakley, M.D., *pro se*
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Nashville, Tenn. 37203
(615)340-6510

This 15th day of June, 1999

ORAL ARGUMENT REQUESTED

"In all thy ways acknowledge Him and He shall direct thy paths." Proverbs 3:6.

APPENDIX A - TENNESSEE SUPREME COURT OPINION OF 12/21/98 - REVERSING COURT OF APPEALS

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
DEC 21 1998
Clerk of the Courts

FOR PUBLICATION

JENNIFER O. WILSON, Appellee,

vs.

LARRY ARNOLD WILSON, Appellant.

FOR APPELLANT: Earl J. Porter, Jr., Nashville, Tennessee
John J. Hollins, Sr. David L. Raybin, Hollins, Wagster & Yarbrough, P.C. Nashville, Tennessee

FOR APPELLEE: John Herbison, Nashville, Tennessee

FOR AMICUS CURIAE:
Richardson and Baker, Clark Lee Shaw Nashville, Tennessee

State of Tennessee John Knox Walkup, Attorney General & Reporter

Michael E. Moore, Solicitor General

Kathy Morante, Deputy Attorney General Nashville, Tennessee

Family Law Section of the Memphis Bar Association, Joy Tanner Bomar, Memphis, Tennessee

Family Law Section of the Tennessee Bar Association, Larry Rice, Memphis, Tennessee.

Filed: December 21, 1998
Hon. Muriel Robinson, Judge,
DAVIDSON CIRCUIT
Supreme Court
No. O1SO1-98O7- CV-OO 130

OPINION

COURT OF APPEALS REVERSED DROWOTA, J.

We granted this appeal to determine whether a private attorney representing the beneficiary of a court order in a civil case may prosecute a criminal contempt action alleging a violation of the order. After due consideration, we conclude that no constitutional principle nor ethical standard automatically disqualifies the private attorney for the beneficiary of the order from prosecuting a contempt action for a violation of the order. Accordingly, we reverse the judgment of the Court of Appeals which adopted an automatic rule of disqualification and remand this cause to the trial court for further proceedings consistent with this decision.

BACKGROUND

The plaintiff, Jennifer O. Wilson, filed suit for divorce against the defendant, Larry A. Wilson, in the Circuit Court of Davidson County. During the course of this litigation, certain restraining orders were issued by the court, and thereafter, the defendant filed a petition for contempt against the plaintiff alleging that she had violated an order of the trial court. The petition failed to specify whether civil or criminal sanctions were being sought.

The plaintiff responded by filing a counterclaim for contempt against the defendant, and a motion to disqualify the defendant's private counsel from prosecuting the contempt action. The trial court denied the motion to disqualify, but granted the plaintiff permission to seek an interlocutory appeal from the ruling. See Tenn. R. App. P. 9

The defendant thereafter filed a second petition for contempt alleging a violation of an order of the trial court. This petition was accompanied by a notice of constitutional rights. The trial court issued an order to show cause. In response, the plaintiff again filed a motion to disqualify defendant's private counsel from prosecuting the criminal contempt action on the basis that counsel was simultaneously representing the defendant in the underlying divorce proceedings. The trial court again denied the motion but granted the plaintiff permission to seek an extraordinary appeal. See Tenn. R. App. P. 10.

The Court of Appeals granted and consolidated the interlocutory and extraordinary appeals. Relying upon a decision of the United States Supreme Court[1], the Court of Appeals reversed the trial court's denial of the motions to disqualify and held that "an appointment of an 'interested' special prosecutor in a criminal contempt proceeding is contrary to the ethical standards required of lawyers in the practice of law, as well as the high ethical standard required of the judicial process and is thereby prohibited."

Thereafter, we granted the defendant's application for permission to appeal, and for the reasons that follow, now conclude that no constitutional principle nor ethical standard automatically precludes a private attorney representing the beneficiary of a court order from prosecuting a contempt action for an alleged violation of the order. Accordingly, we reverse the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with this decision.

ANALYSIS

A. Standard of Review

Recently, in Black v. Blount, 938 S.W.2d 394 (Tenn. 1996),

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[1]Young v. United States ex rel. Vuitton et Fils. S.A., 481 U.S. 787, 107 S. Ct. 2124 95 L. Ed.2d 740 (1987).

this Court held that trial courts have both the inherent authority to initiate contempt proceedings and the concomitant authority to appoint private attorneys to prosecute such contempt actions. Id. at 402-03. Unlike this case, however, the conduct in Black for which contempt proceedings had been instituted did not involve the alleged violation of a court order. Also unlike this case, the private attorney appointed by the trial court to prosecute the contempt proceeding in Black did not represent any of the litigants in the underlying action from which the contempt charges arose. Accordingly, in Black we did not address, and in fact expressly reserved for a case in which it was squarely presented, the question of whether a private attorney already representing the beneficiary of a court order in a civil case may prosecute a contempt action alleging a violation of that order. Id at 402. It is that narrow question of law which now is squarely presented in this appeal.[2] Since this is a question of law, our review is *de novo* upon the record before this Court with no presumption of correctness attaching to the decisions of the lower courts. Warren v. Estate of Kirk, 954 S.W.2d 722, 723 (Tenn. 1997); Bain v. Wells, 936 S.W. 2d 618,622. (Tenn. 1997)

B. The Young Decision

Prior to 1987, the leading case on this issue was McCann v. New York Stock Exchange, 80 F.2d 211 (2nd Cir. 1935), in which Judge Learned Hand commented that to prosecute an indirect criminal contempt, committed outside the presence of the court, "the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information.... There is no reason why he should not do so, and every reason why he should...." Id at 214. In Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S.Ct.

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[2]The briefs of the parties to this appeal as well as the briefs filed on behalf of the *amicus curiae* urge us to decide other issues relating to contempt proceedings. We decline to address issues not presented by this appeal.

2124, 95 L.Ed.2d 740 (1987), however, the United States Supreme Court parted company with Judge Hand when it held that federal judges could no longer appoint a private lawyer representing the beneficiary of a court order to also prosecute a criminal contempt action alleging a violation of the order.

Young began as a trademark infringement action brought by Vuitton et Fils, S.A., (Vuitton), a manufacturer of expensive handbags, against several businesses which were manufacturing and selling inexpensive imitations of Vuitton's merchandise. In July of 1982, the parties settled the trademark infringement case. Under the settlement agreement, the defendants were required to pay damages and enjoined from using Vuitton's registered trademark. Suspecting that the defendants had violated the injunction, Vuitton in early 1983 commissioned a private firm to conduct an undercover investigation. Upon discovering evidence of noncompliance, Vuitton's attorney asked the district court to appoint him and his colleagues as special counsel to prosecute a criminal contempt action for violation of the injunction. The district court found probable cause to believe that the defendants were violating the injunction and appointed Vuitton's attorney and his colleagues to represent the United States in continuing the investigation and in prosecuting the contempt action. Significantly, the appointment conferred upon Vuitton's attorneys all the powers ordinarily possessed by a government prosecutor, yet the United States Attorney's Office took no part in the prosecution of the case beyond wishing the special prosecutor "good luck." Id, 481 U.S. at 791-92, 107 S.Ct. at2129.

Over the next month, the special prosecutor compiled more than 100 audio and video tapes of meetings and wiretapped telephone conversations between the defendants and investigators. With that evidence, the special prosecutor requested and obtained an order from the district court directing the defendants to show cause why they should not be cited for contempt for either violating or aiding and abetting the violation of the injunction. The defendants filed motions opposing both the show cause order and the appointment of Vuitton's attorneys as special prosecutor. The defense motions were denied, and eventually two of the defendants entered guilty pleas to contempt.

Several other defendants were tried and convicted of contempt. Id., 481 U.S. at 792, 107 S.Ct. at 2129.

Before the United States Supreme Court, the defendants advanced two primary arguments as grounds for reversal of their convictions. First, they contended that a district court lacks authority to appoint private counsel to prosecute a contempt action and that only the U.S. Attorney may initiate a criminal contempt prosecution. Id.481 U.S. at 793, 107 S.Ct. at 2130. Alternatively, the defendants maintained that a district court may not appoint an attorney representing the beneficiary of a court order to prosecute a criminal contempt action alleging a violation of that order. Id., 481 U.S. at 802-14, 107 S.Gt. at 2135-38.

In rejecting the defendants' first argument, the Court held that district courts have inherent power both to initiate contempt proceedings to punish disobedience to their orders and to appoint a private attorney to prosecute such contempt actions. Id., 481 U.S. at 793, 107 S.Ct at 2130.[3] The Court commented that this power to appoint should be exercised sparingly, and only after the public prosecutor has denied a district court's request to prosecute a contempt. Id., 481 U.S. at 801, 107 S.Ct. at 2133.

The Supreme Court, however, agreed with the defendants' second argument and found that the district court erred by appointing an attorney who was representing the beneficiary of a court order to prosecute a criminal contempt for an alleged violation of the order. The Court first emphasized that private attorneys appointed to prosecute criminal contempt actions represent the interest of the United States in vindicating a court's authority. Id. 481 U.S. at 804,

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[3]The court in Black relied upon this portion of the Young decision as support for our holding that trial courts in Tennessee have both the inherent power to initiate contempt proceedings and the concomitant power to appoint private counsel to prosecute such contempt actions.

107 S.Ct. At 2136. A private attorney prosecuting a criminal contempt, therefore, must assume the unique responsibility of a government prosecutor which is to pursue justice and guarantee that "guilt shall not escape nor innocence suffer." Young, 481, U.S. at 802-03, 107 S. Ct. At 2135 (quoting Berger v. United States, 295 U.S. 78,88, 55 S. Ct. 629,633 79 L. Ed. 1314(1935)).

While recognizing that a private party's interest in obtaining the benefits of a court order may sometimes coincide with the special prosecutor's pursuit of justice, the Court stressed that the two interests may also at times diverge. Young, 481 U.S. at 805, 107 S.Ct. at 2136. As examples of the possible divergence, the Court hypothesized that an attorney for a private client serving as special prosecutor of a contempt action may be tempted either to bring a tenuously supported prosecution or to abandon a meritorious prosecution if either action would inure to the benefit of his or her private client. The Court declared that appointing counsel for an interested party to prosecute a criminal contempt action 'at a minimum create[s] opportunities for conflicts to arise and create[s] at least the appearance of impropriety." Id., 481 U.S. at 806, 107 S.Ct. at2137. In concluding that lawyers already representing an interested party have an insurmountable conflict of interest if they also undertake to prosecute a criminal contempt case, the Court stated:

> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice. A prosecutor of a contempt action who represents the private beneficiary of the court order allegedly violated cannot provide such assurance, for such an

> attorney is required by the very standards of the profession to serve two masters.

Id., 481 U.S. at 805, 107 S.Ct. at 2138.

The Young Court did not base its decision upon constitutional grounds but instead announced the rule of disqualification in its supervisory role over lower federal courts. Though we are not constitutionally bound to follow Young, the rationale for the decision was based largely upon the Model Code of Professional Responsibility which, as modified, currently governs the conduct of attorneys in Tennessee. See Tenn. Sup. Ct. R. 8. As explained below, however, we decline to adopt the rule of automatic disqualification announced in Young.

C. Constitutional Principles

Although appellate courts ordinarily do not address constitutional issues if a case may be decided upon non-constitutional grounds, in this case a decision on the constitutional issue is necessary to fully determine the case and the rights of the parties. State v. Hall , 958 S.W.2d 679, 695 n. 15 (Tenn. 1995). This Court previously has opined that due process ... calls for such procedural protections as the particular situation demands." Phillips v. State Board of Regents, 863 S.W.2d 45, 50 (Tenn. 1993) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). In determining what procedural protections a particular situation demands, three factors must be considered: (1) the private interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Phillips, 863 S.W.2d at 50; Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Though we have found no other

judicial decision[4] addressing the constitutional aspect of the issue in this appeal, in our view, application of the three-pronged balancing test clearly indicates that due process does not preclude allowing an attorney who represents the beneficiary of a civil court order to simultaneously prosecute a contempt action for an alleged violation of the order.[5]

At stake is a contempt defendant's liberty or property interest. A defendant found guilty of general contempt in Tennessee may be punished by fine or by imprisonment, or both. However, any fine imposed may not exceed fifty dollars and any term of imprisonment may not exceed ten days. Tenn. Code Ann. - 29-9-103 (Supp. 1998). The risk that a defendant's liberty interest will be erroneously deprived by the current practice which allows a litigant's private attorney to

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[4]The plaintiff cites several cases in which courts have held that due process precludes a private attorney from representing a victim in civil litigation and simultaneously serving as special prosecutor in a criminal case involving the same conduct. See e.g. State v. Eldridge, 951 S.W.2d 775 (Tenn. Crim. App. 1997); Commonwealth v. Hubbard, 777 S.W.2d 882 (Ky. 1989); State v. Storm, 661 A.2d 790 (N.J. 1995); Kerns v. Wolverton, 381 S.E.2d 258 (W.VA. 1989); but. see Hopkins v. State, 429 So.2d 1146(Ala. Crim. App. 1983). Those cases clearly are distinguishable from the issue in this appeal.

[5]But see John D. Bessler, The Public Interest and the Unconstitutionality of Private Prosecutors, 47 Ark.L.Rev. 511,575 (1994); Patricia Moran, Note, Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the of the Federal Rules of Criminal Procedure, 54 Fordham L. Rev. 1141, 1149-51 (1986) (applying the three-pronged balancing test and concluding the Due Process precludes allowing an attorney representing the beneficiary of a court order to also prosecute a contempt action alleging a violation of the order).

prosecute contempt is slight because it is the trial judge, not the private attorney, who actually decides whether a contempt action may proceed. See Tenn. R.Crim. P. 42(b). Since the risk of erroneous deprivation is minimal, there is no real benefit or value in adopting a rule which would preclude a litigant's private attorney from prosecuting a contempt. Finally, tremendous fiscal and administrative burdens would result from a substitute procedural requirement. Contempt proceedings often arise in domestic relations cases in state courts. However, unlike the federal system, there is no fund in Tennessee from which to compensate private counsel appointed to prosecute criminal contempt actions.[6] It is unrealistic to expect district attorneys to prosecute contempt actions arising from alleged violations of civil court orders.[7] District attorneys already have a

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[6]Contrary to the plaintiff's assertions, our decision in Black supra, does not support the proposition that a trial court may routinely tax attorney's fees as costs in contempt proceedings. In fact, the rule of Ferguson v. Paycheck, 672 S.W.2d 746 (Tenn. 1984), which was applied in Black, specifically does not allow a trial court to tax as costs fees for attorneys appointed to serve the interests of litigants. Though the only interest at issue in Black was the vindication of the court's authority, most contempt cases will serve to both vindicate the court's authority and to benefit a litigant by enforcing a court order. Thus in the vast majority of contempt proceedings, a trial court may not tax attorney's fees as costs.

[7]While this Court stated in Black, supra, that a trial court should appoint a private attorney only after the district attorney refuses a request of the court to prosecute a contempt action, that statement applies only if no attorney familiar with the grounds for contempt is readily available to prosecute the action. For example, in Black the only attorney familiar with the behavior allegedly constituting contempt was also the primary witness in the case and therefore could not prosecute the contempt action. See Tenn. Sup. Ct. R.8, DR 5-101 ("lawyer shall not accept employment in ...litigation if the lawyer knows or it is obvious that the

heavy case load prosecuting violations of the general criminal laws. See State ex rel O'Brien v. Moreland, 778 S.W.2d 400, 406 (Mo. App. 1989) (discussing similar practical problems surrounding the rule of automatic disqualification). Were we to hold that due process precludes a litigant's private attorney from prosecuting contempt proceedings, many citizens would be deprived of the benefits to which they already have been adjudged entitled by state courts and many state court orders would remain unenforced. The minimal risk that a defendant will be erroneously deprived of his or her liberty interest if a litigant's private attorney prosecutes a contempt proceeding is far outweighed by the very real fiscal and administrative burdens certain to accompany the adoption of a substitute procedure.[8] We hold that Due Process does not mandate adoption of a rule which automatically disqualifies a litigant's private counsel from prosecuting

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lawyer...ought to be called as a witness").

[8]Despite the dissent's criticism, it is entirely appropriate under both the state and federal constitutions to consider the fiscal burdens which would result from adoption of a rule of automatic disqualification. See Phillips, 863 S.W.2d at 50. Consideration of the 'checkbook" in fact was mandated by the United States Supreme Court in Matthews, 424 U.S. at 335, 96 S.Ct. at 903. Since the dissent agrees with the majority's conclusion that Due Process does not mandate adoption of a rule of automatic disqualification, its criticism of the underlying analysis is puzzling. Significantly, in all the cases cited by the dissent in support of its criticism, either this Court or the United States Supreme Court concluded that the constitutional rights of the defendants outweighed the fiscal or administrative burdens associated with the new procedures, in none of those cases was the recognition of additional procedures based solely upon a potential and theoretical ethical conflict of interest, which is the only ground advanced by the dissent in this case to support adoption of a rule of automatic disqualification.

a contempt action.

D. Ethical Standards

We have also found no ethical standard which mandates adoption of an automatic rule of disqualification. While the Young decision is theoretically attractive, many practical differences between the federal judicial system and the courts of Tennessee exist which ameliorate the perceived conflict of interest identified in Young. For example, unlike the private attorneys appointed as special prosecutors in Young, private attorneys prosecuting criminal contempt actions in Tennessee are not ordinarily clothed with all the powers of a public prosecutor. Indeed, there is no hint in this appeal that the defendant's attorney has been given the powers of the public prosecutor in pursuing these contempt actions. Here, unlike Young, we simply are not dealing with a private attorney who has "the power to employ the full machinery of the state in scrutinizing any given individual." Young, 481 U.S. at 805, 107 S.Ct. at 2138. The potential for abuse and overreaching about which the Young Court expressed concern therefore does not exist in Tennessee.

Furthermore, we do not believe that appointing a private attorney who represents the beneficiary of a court order to prosecute a contempt action for an alleged violation of that order creates the potential for conflict and the appearance of impropriety. Contempt of court is intended to vindicate a court's authority and to maintain the integrity of court orders. State v. Winningham, 958 S.W.2d 740 (Tenn. 1997). In a contempt proceeding alleging a violation of a court order, therefore, the interest of the private litigant coincides with the interest of the court. The common goal is to force compliance with the court order. Although the motivational reasons may differ, the interest is the same. The private lawyer is ethically obligated to exercise his or her independent professional judgment to protect the common interest. Tenn. Sup. Ct. R. 8, DR 5-105. That a private lawyer is "interested" in protecting the interest of his or her client and the legitimate concern of the court does not detract from the integrity of the judicial process when the interest of the client and the concern of the court is the same -- enforcement of a court order.

Additionally, in our view a litigant's private attorney is no less likely to seek justice and no more likely to be influenced by improper motives than a public prosecutor or a disinterested private attorney. We readily acknowledge that an attorney representing the beneficiary of a court order will zealously attempt to enforce compliance with the order if allowed to prosecute a contempt proceeding. There is, however, nothing improper about zealous prosecution. Even the Young Court recognized that in our adversary system, "prosecutors are necessarily permitted to be zealous in their enforcement of the law." Young, 481 U.S. at 806, 107 S.Ct. at 2137. If a prosecutor is "honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury--not the prosecutor." Wright v. United States, 732 F.2d 1048, 1056 (2nd Cir. 1984). While prosecutors are expected to proceed with "eagerness and vigor" and are permitted to "strike hard blows," they may not strike "foul ones." Berger, 295 U.S. at 85, 55 S.Ct. at 633. The ethical rules governing the conduct of all attorneys in Tennessee should prevent a private attorney representing the beneficiary of a court order from becoming overzealous or from striking foul blows.

Furthermore, the procedural safeguards of Tenn. R. Crim. P. 42(b) ameliorate concerns that a private attorney will improperly institute a contempt proceeding in contravention of the interests of justice. In pertinent part that rule provides as follows:

> A criminal contempt ... shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or an application of the district attorney or an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to

> admission to bail as provided in these rules. If the contempt charge involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the hearing except with the defendant's consent.
>
> Upon a verdict of finding of guilt the court shall enter an order fixing the punishment.

Tenn. R. Crim. P. 42(b) (emphasis added.) Under this rule, a contempt action can not proceed unless the trial court issues an order to show cause after reviewing a written application of the private attorney. The trial court obviously will realize when the attorney representing the beneficiary of the court order in the underlying civil litigation is also the attorney filing the application to institute contempt. The trial court will be in a position to carefully scrutinize the application. The judicial oversight prescribed by Rule 42 virtually eliminates any danger that contempt actions will proceed if instituted for improper motives or without regard to the interests of justice. To further guard against the possibility of abuse, however, we hold that the provisions of Tenn. R. Civ. P. 11 apply to the written applications which attorneys must file with the trial court to institute contempt proceedings. It is certainly unlikely that attorneys will risk Rule 11 sanctions by filing unjustified or improper contempt applications.

Accordingly, we hold that allowing an attorney for the beneficiary of a court order to prosecute a contempt proceeding alleging a violation of that order does not involve an inherent or potential conflict of interest sufficient to warrant adoption of an automatic rule of disqualification.

For the reasons previously explained, we conclude that no constitutional principle nor ethical standard automatically disqualifies a private attorney representing the beneficiary of a court order from simultaneously prosecuting a contempt action

Surprisingly few state courts have addressed the issue in this appeal. In a decision rendered before Young, the West Virginia Supreme Court employed similar rationale and adopted a rule of

automatic disqualification. State ex rel. Koppers Co. Inc. v. International Union of Oil, Chemical and Atomic Workers. 298 S.E.2d 827 (W. Va. 1982). Some state courts have followed Young with little or no analysis of the issue. See Di Sabatino v. Salicete, 671 A. 2d 1344 (Del. 1996); Department of Social Services ex rel. Montera v. Montera, 758 P. 2d 690 (Haw. App. 1988). Other states courts, also with little or no discussion, have not applied a rule of automatic disqualification. Marcisz v. Marcisz, 347 N.E. 2d 477 (Ill. 1976); Lamb v. Fowler, 574 So. 2d 262 (Fla. App. 1991); In re Marriage of Betts, 558 N.E. 2d 404 (Ill. App. 1990) which alleges a violation of the order. Accordingly, we reverse the judgment of the Court of Appeals which adopted an automatic rule of disqualification and remand this cause to the trial court for further proceedings consistent with this decision.

"s/ Frank F. Drowota, III"
FRANK F.DROWOTA, III
JUSTICE

Concur:

Anderson, C.J.
Holder, Barker, JJ.
Birch, J. - Separate Dissenting Opinion

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
DEC 21 1998
Clerk of the Courts

JENNIFER O. WILSON

Appellee

v.

LARRY ARNOLD WILSON

Appellant

FOR PUBLICATION

FILED: DECEMBER 21, 1998

DAVIDSON COUNTY

HON. MURIEL ROBINSON, JUDGE

NO. 01-S-01-9807-CV 00130

DISSENT

The majority in this case holds that "no constitutional principle nor ethical standard automatically disqualifies the private attorney for the beneficiary of [a court] order from prosecuting a contempt action for a violation of the order. Although I agree that the appointment of such an attorney as a "private prosecutor" does not violate the contemnor's due process rights, I write separately to express my view that such appointment does, indeed, create the potential for conflict and impart the appearance of impropriety. Such potential and appearance mandate a rule of automatic disqualification for ethical reasons. Applying this rule to the record before us, I would affirm the judgment of the Court of Appeals.

Contempt may be either civil or criminal in nature. Civil contempt is an action brought to enforce private rights. Black v.

Blount, 938 S.W. 2d 394, 398 (Tenn. 1996). Criminal contempt, on the other hand, is an action brought to vindicate a court's authority and to maintain the integrity of the court as an "organ of society." Id. see also State v. Winningham, 958 S.W.2d 740, 746 (Tenn. 1 997). Because of these different objectives, the civil and criminal contemnors are treated differently. While both may be imprisoned, the civil contemnor "carries the keys to his prison in his own pocket" and must be immediately released upon compliance with the court's orders. State ex rel. Anderson v. Daugherty, 137 Tenn. 125, 127, 191 S.W. 974, 974 (1917) . The criminal contemnor does not carry the same keys. He or she faces an unconditional sanction which is punitive in nature. Black v. Blount, 938 S.W.2d at 398. Thus, this Court has previously recognized that "while criminal contempts may arise in the course of private civil litigation, such proceedings, in a very true sense raise an issue between the public and the accused." Id. (quoting State ex. Rel Anderson v. Daugherty, 137 Tenn. at 127, 191 S.W. at 974)

Yet despite this "issue between the public and the accused," the majority maintains that the interest of the private litigant does not compromise the integrity of the judicial process because it is the same as the State's interest: to force compliance with the court's order. Were this simply a civil contempt proceeding, I would agree. However, this is a criminal proceeding where the State's essential interest is(or should be)to punish the accused for prior noncompliance. While the private litigant may endeavor to satisfy several different interests including punishment, compliance would be paramount among them.[1]

Because the interests of the private litigant and the State may not coincide, the "private prosecutor" may be forced to represent

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[1]For example, the private litigant may pursue criminal contempt for violation of a restraining order, not to punish the accused, but to create a record for use in later civil proceedings against the accused, or to "scare" the accused, or to obtain other advantages from the contemnor's incarceration or other sanction.

"differing interests"[2] in the criminal contempt proceeding. These "differing interests" may lead to different choices in the exercise of the lawyer's independent professional judgment. For example, while the State's interests may mandate the exercise of greater restraint in the proceeding, the private litigant's interests may mandate that the lawyer exercise little or no restraint in the proceeding. Because the different interests may compromise the exercise of the lawyer's independent professional judgment, the representation is an ethical violation under Tenn. S. Ct. R. 8, DR 5-105(A). This potential conflict is not ameliorated simply by saying that the lawyer is "ethically obligated to exercise his or her independent professional judgment to protect the common interests of the clients." Because the lawyer has both the State and the private litigant as clients, the lawyer is thrust, in my opinion, into an ethical conundrum.

The majority all but acknowledges (albeit obliquely) that the use of "private" unsworn lawyers to represent the interests of the State while simultaneously endeavoring to represent the interests of a client is ethically questionable. They recognize the remedy of disqualification, but describe it as economically prohibitive. But this Court should not link justice to the checkbook in so direct a manner.

It occurs to me that the same concerns were aired when

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[2]Tenn. S. Ct. R. 8, DR 5-105(A) states:

A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5- 105 (C).

Gideon v. Wainwright[3] was decided, when In re Gault[4] was decided, when Boykin v. Alabama[5] was decided, and when State v. Mackey[6] was decided. Admittedly, these cases concerned constitutional rights, but one lesson from them is that we survived nonetheless--both jurisprudentially and economically. Although economics is, of course, a necessary consideration, all too often the remedy is sacrificed on the altar of economics. Such is the case here. It should not be.

Accordingly, because DR 5-105(A) states that a lawyer "shall decline" employment which may compromise the lawyer's independent professional judgment, I would hold that the Code of Professional Responsibility automatically disqualifies a private litigant's lawyer from acting as a prosecutor in a contempt action resulting from the underlying civil litigation. Thus, I would affirm the Court of Appeals's judgment reversing the trial court and holding that a litigant's private counsel is disqualified from acting as a prosecutor in a criminal contempt action.

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[3]372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (requiring states to provide counsel to indigent defendants in noncapital proceedings).

[4]387 U.S. 1, 87 S. Ct. 1428,18 L.Ed 527 (1967) (requiring states to provide due process rights of criminal trials in juvenile proceedings)

[5]395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)(requiring courts to canvas the accused's knowledge and voluntariness in entering a guilty plea).

[6]553 S.W. 2d 337(1977)(elaborating on Boykin's requirements for a plea colloquy before acceptance of an accused's guilty plea).

"S/ Adolpho A. Birth, Jr."
ADOLPHO A. BIRCH, JR.,
JUSTICE

APPENDIX B - TENNESSEE COURT OF APPEALS OPINION OF 3/20/98 - REVERSING TRIAL COURT

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

JENNIFER O. WILSON,

Plaintiff,

LARRY ARNOLD WILSON,

Defendant.

Davidson Circuit No. 96D-1850
C.A. No. 01AOI-9704-CV-00152

Hon. Muriel Robinson, Judge

Filed
MAR 20 1998
Clerk of the Court

JOHN E. HERBISON, Nashville, Attorney for Plaintiff.
EARL J. PORTER, JR., Nashville, Attorney for Defendant.

REVERSED AND REMANDED

Opinion Filed Mar 20 1998

TOMLIN, Sr. J.

Jennifer O. Wilson ("plaintiff) filed suit for divorce against Larry A. Wilson (defendant") in the Circuit Court of Davidson County. During the course of this litigation, certain restraining orders were issued by the court. Thereafter, defendant filed a petition against plaintiff for contempt. The petition failed to specify whether civil or criminal sanctions were being sought. Plaintiff filed a counterclaim for contempt against defendant.

Plaintiff filed a motion to disqualify private counsel from prosecuting the petition for criminal contempt, noting that it was the same counsel who was representing defendant in the divorce

proceedings. The trial court denied the motion to disqualify, granted defendant permission to seek an interlocutory appeal of that ruling, and stayed proceedings on the pending contempt petitions of both plaintiff and defendant.

The defendant subsequently filed another petition for contempt, upon which a show cause order was issued. Plaintiff once again filed a motion to disqualify private counsel from prosecuting the criminal contempt action. The trial court denied this motion and entered an order granting a Rule 10 T.R.A.P. extraordinary appeal. This court thereafter entered an order granting a Rule 9 T.R.A.P, interlocutory appeal relative to the trial court's initial order denying plaintiffs motion to disqualify private counsel and shortly thereafter granted a Rule 10 T.R.A.P. extraordinary appeal from the trial court's denial of the plaintiffs second motion to disqualify private counsel. The Rule 10 appeal was by order consolidated with the previously granted Rule 9 appeal.

The sole issue in this consolidated appeal is whether or not a lawyer representing one party in a civil proceeding may be appointed and serve as the prosecutor of a petition for criminal contempt against the other party, based upon conduct arising out of the civil proceeding. For the reasons hereinafter stated, we hold that such an appointment of an "interested" special prosecutor in a criminal contempt proceeding is contrary to the ethical standards required of lawyers in the practice of law, as well as the high ethical standard required of the judicial process and is thereby prohibited.

Other than the procedural facts as set out above, the underlying facts in this case pertaining to the divorce and the conduct of the parties are really not material to the consideration of this issue. Our scope of review is *de novo* with no presumption of correctness. City of Tullahama v. Bedford County, 938 S.W. 2d 408, 412 (Tenn. 1997).

The propriety of using private lawyers to prosecute criminal contempt cases has not been addressed as yet by our supreme court. However, it has been addressed in part recently by the Middle Section of this court in a case styled Woodside v. Woodside. No. 01-A01-9503-PB00121 , 1995 WL 623077 (Tenn. Ct. App. 1995).

In addition, the use of private attorneys as special prosecutors to assist the District Attorney General in the prosecution of criminal defendants has been addressed twice in recent years by our brothers on the Court of Criminal Appeals. The first of these two cases is State v. Bennett, 798 S.W. 2d 783 (Tenn. Crim. App. 1990), followed by State v. Eldridge, No. 01C019504-CC.-00 106, 1997 WL 230200 (Tenn. Crim. App. 1997). These three Tennessee cases, along with the well-written analytical opinion from the U.S. Supreme Court styled Young v. United States ex. Rel. Vuitton et Fils S.A., 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), provide us with compelling persuasive authority why this court in this case should hold that henceforth private attorneys who represent a party that is a beneficiary of a court order may not be appointed as special prosecutor in a contempt action alleging a violation of that order.

We believe that it will be helpful to examine the two distinct approaches that characterize the way that various state and federal courts have analyzed and evaluated the issue of interested prosecutors. While the approaches are different, the results reached in each approach and some of the rationale utilized therein are influential in deciding the case here under consideration. We have chosen to call them (1) the due process approach and (2) the ethical approach.

Following the due process approach, a court would hold that the appointment of a private attorney as special prosecutor in a criminal proceeding who has an interest in a case other than the interest of justice, would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and/or the Law of the Land Clause in Article I, section 8 of the Tennessee Constitution. This approach would assert that the appointment of a private prosecutor in a criminal proceeding arising out of a civil proceeding where the appointed attorney also represented one of the civil litigants is a *per se* violation of the due process rights of the criminal defendant.

A pivotal case in this approach is State v. Bennett, 798 S.W.2d 783 (Tenn. Crim. App. 1990). The Bennett court held that T.C.A.. 8-7-401 (Supp. 1997), the Tennessee statute authorizing the appointment of special prosecutors, did not violate either the United States Constitution or the Tennessee Constitution. While upholding

the constitutionality of the statute, the Bennett court went further and examined the action of the special prosecutors to determine whether their actions as such resulted in the deprivation of a constitutional right of the defendant. Among the four areas the court looked at, it noted two areas of conduct that are relevant to the case at bar: first, the special prosecutors therein did not represent the family of the victim in a civil case arising out of the occurrence which gave rise to criminal prosecution and second, the proceeding in Bennett was not a contempt proceeding which arose out ofa civil prosecution. So although neither scenario occurred in Bennett, the court expressed in dicta that either of these two scenarios would have been a violation of due process.

The case of State v. Eldridge, 1997 WL 230200 (Tenn. Crim. App. 1397), wherein the pivotal facts are quite similar to the facts of the case at bar, involved a criminal prosecution rather than a contempt proceeding arising out of a civil case. The defendant in Eldridge had been indicted for attempted second degree murder. As permitted by the aforementioned statute, the victim's private attorneys had been employed as special prosecutors. Some seven months prior to the criminal trial, these same private attorneys filed a civil suit on behalf of the victim against defendant, seeking $1,000,000 in compensatory damages and $2,000,000 in punitive damages, for injuries arising from the same incident being prosecuted in the criminal case. With the exception of the rebuttal argument, which was made by the Assistant District Attorney General, the special prosecutors handled the entire prosecution.

In an excellent opinion, Judge Joe Riley reviewed among other things how Tennessee and other jurisdictions handled private prosecutions of criminal matters. The court acknowledged the forceful impact of the analysis of the conflicts inherent in the use of special prosecutors as set forth in Young v. United States, *supra*. The court reviewed the ethical dilemmas which arose out of those conflicts of interest. and considered the due process implications as well. While acknowledging Bennett and its holding on the due process issue, the Eldridge court noted that an analysis of the activities of the special prosecutors in its case therein revealed a due process violation had occurred, distinguishing Eldridge from Bennett. The Eldridge court concluded that defendant's rights under both the U.S. and Tennessee

Constitutions had been violated.

The desirability of following the due process approach grows stronger as the potential punishment for the crime being prosecuted by the interested special prosecutor grows more severe. The need for constitutional safeguards such as the right to a jury trial, etc., increases in proportion to the jeopardy being placed upon the rights of a criminal defendant. Therefore, when a criminal offense carries potentially severe punishment, it is clear that the due process approach would be the more logical to follow. Accordingly, both Eldridge and Bennett involved the prosecution of a much more serious charge than that of criminal contempt in a civil proceeding.

However, the utilization of the due process approach in criminal contempt proceedings is less desirable in the light of the quasi-criminal status of contempt in this state. See State v. Sammons 656 S.W.2d 862, 867 (Tenn. Crim. App. 1982). The Sammons court distinguished this state's criminal contempt offense from the "serious contempt" referred to by the United States Supreme Court in Bloom v. Illinois, 391 U.S. 194, 197, 88 S.Ct. 1477, 1479, 20 L.Ed.2d 522, 526 (1968). In the federal system, the punishment for criminal contempt is left to the discretion of the trial judge, who can levy fines and order incarceration for well over one year. 18 U.S.C. 401(3)(1966). Given the potential severity of the punishment for criminal contempt in the federal system, it is clear that the safeguards of the due process approach should apply.

The Sammons court noted that, contrary to the safeguards in the federal system, a defendant in a criminal contempt action in this state is not afforded a jury trial. Sammons, 656 S.W.2d at 867. Furthermore, a criminal contempt proceeding is not even considered a criminal prosecution. Id. Because of its minor nature, criminal contempt in Tennessee has a statutory maximum fine of fifty ($50) dollars and ten (10) days imprisonment which may be ordered in circumstances other than nonpayment of child support. T.C.A. 29-9-103 (Supp. 1997). It could well be contended that the punishment for criminal contempt in this state has not been considered of such significance or severity so as to warrant the safeguards inherent in the due process approach. To invoke either the

U.S. or State Constitution in settling this issue strikes with more hammer than needed to drive the nail. The due process approach presents inherent complications which are better avoided if a firm path around them may be found. We think it unwise and unnecessary to enter this quagmire, and adopt a course equally sound and effective.

In our opinion, the adoption of the ethical approach places our decision on firm legal grounds. The ethical approach involves our consideration of the ethical standards that guide the conduct of both practicing attorneys and judges. Utilizing this approach, our Code of professional Responsibility serves as a beginning point for prohibiting the appointment of interested special prosecutors. The aforementioned case of Woodside v. Woodside, 1995 WL 623077 (Tenn. Ct. App. 1995) *perm. app. denied, concurring in results only*, is the only case emanating from the civil side that has dealt with this issue. In a post-divorce proceeding to increase and enforce child support, the trial court appointed the attorney for wife as special prosecutor to prosecute a criminal contempt action against husband, resulting in the court finding husband guilty of willful contempt, awarding wife a judgment for arrears in child support and committing husband to the county workhouse for six months.

The sole issue presented by husband on appeal to the middle section of this court was whether the trial court abused its discretion in allowing an interested special prosecutor to prosecute the criminal contempt proceeding, contending that it was in violation of the principle set forth in Young v. United States, supra. The Woodside court quoted extensively from Young. The court concluded that it did not consider Young to be binding upon the courts of Tennessee, declaring that it would not be followed. The judgment of the lower court was affirmed, but not in the usual sense.

In a thorough and well-reasoned concurring opinion, Judge William C. Koch, Jr. concurred in the result of the majority opinion, but only for the reason that the appellant waived his right to raise the issue before the appellate court by failing to timely make a demand for another prosecutor in the trial court. Judge Koch also voiced the opinion that the majority opinion reflected an "unduly narrow view of our responsibility and is inconsistent with our other decisions." In an

illuminating overview of Young. Koch noted that the majority in Young rested its decision on the American Bar Association's Model Code of Professional Responsibility (1969, revised 1980). He further noted that the Tennessee Supreme Court had adopted the the same

code, and that it currently governs the conduct of all attorneys in this state. See Tenn. S.Ct.R.8.

In Woodside, Judge Koch outlined the relative responsibility of the courts of this state, and more explicitly the appellate courts, in exercising supervisory power over the trial courts. He stated:

> The Tennessee State Supreme Court was exercising its inherent judicial power when it promulgated the Tenn. S.Ct.R 8 in 1981. The Code of Professional Conduct in Tenn. S.Ct.R. 8 provides the bench and bar with a guide to a lawyer's obligations to his or her client under various circumstances. The Code's disciplinary rules are mandatory, and the ethical considerations are aspirational and represent the objectives toward which every lawyer should strive. Tenn. S.Ct.R. 8, Preliminary Statement.
>
> Even though the Tennessee Supreme Court has the exclusive prerogative to promulgate rules governing the practice of law, all the courts have the power and duty to apply these rules in appropriate circumstances. The intermediate appellate courts have frequently based their decisions on the Code of Professional Responsibility. Accordingly, this court has relied on portions of Tenn. S.Ct.R 8 to resolve disputes.... Id. at ""7 (Citations omitted).

Judge Koch concluded that inasmuch as Mr. Woodside and his lawyer were aware from the outset of the trial that the former Mrs. Woodside's lawyer would be prosecuting the criminal contempt charges against him, and raised no objection about this arrangement until the trial was finished and the judgment rendered, that Mr. Woodside had waived his right to take issue with the former Mrs. Woodside's lawyer to prosecute the criminal contempt case against

him. While affirming the results of the trial court, Judge Koch concluded that rather than turn judicial backs to the rationale in Young he would leave the question of the propriety of using lawyers for interested parties to prosecute criminal contempt cases for another day. We are of the opinion that that day has come.

A closer and more thorough examination of Young without question provides the justification for this court's ruling. The basic facts in Young are not too dissimilar from the facts in the case under consideration. The suit in Young was brought by two defendants, who in settling a suit against them agreed to the entry of a permanent injunction prohibiting them from infringing certain trademarks of a leather goods manufacturer. Subsequently, the manufacturer's attorneys submitted an affidavit as a result of which the district court found probable cause that these earlier defendants could be in violation of the injunction. The court granted the request of the manufacturer's attorneys for their appointment as special counsel to represent the Government in the investigation and prosecution of a criminal contempt action against these two parties. The court of appeals affirmed, rejecting the contention that appointment of manufacturer's attorneys as special counsel violated their right to be prosecuted by an impartial prosecutor. The supreme court reversed, with the majority opinion basing the reversal on that court's authority to supervise the operation of the courts in the federal system, relying upon the provisions of the Code of Professional Responsibility, as promulgated by the American Bar Association, which had been adopted in 1982.

Because of the relevance of the analysis by the Young majority, we quote at length from the majority opinion:

> ...contempt power "has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary course of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors." (emphasis in original) (citation omitted).
>
> ....

While a court has the authority to initiate a prosecution for criminal contempt, its exercise of that authority must be restrained by the principle that "only the least possible power adequate to the end proposed' should be used in contempt cases." *United States v. Wilson*, 421 U.S. 309, 319,95 S.Ct. 1802, 1808,44 L.Ed.2d 186 (1975) (quoting *Anderson v. Dunn*, 6 Wheat., at 231).

....

This distinctive role of the prosecutor is expressed in Ethical Consideration (EC) 7-13 of Canon 7 of the American Bar Association (ABA) Model Code of Professional Responsibility (1982): "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

....

Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated. ... The prosecutor is appointed solely to pursue the public interest in vindication of the court's authoritv. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution. (footnote omitted).

If a Justice Department attorney pursued a contempt prosecution for violation of an injunction benefiting any client of that attorney involved in the underlying civil litigation, that attorney would be open to a charge of committing a felony under 208(a). Furthermore, such conduct would violate the ABA ethical provisions, since the attorney could not discharge the obligation of undivided loyalty to both clients where both have a direct interest. The

Government's interest is in dispassionate assessment of the propriety of criminal charges for affronts to the Judiciary. The private party's interest is in obtaining the benefits of the court's order. While these concerns sometimes may be congruent, sometimes they may not. A prosecutor may he tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the private client. Conversely, a prosecutor may be tempted to abandon a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges.

Regardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety (an issue on which we express no opinion), that appointment illustrates the potential for private interest to influence the discharge of public duty. (Emphasis in original) (footnote omitted).

....

A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. These decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court.

The requirement of a disinterested prosecutor is consistent with our recognition that prosecutors may not necessarily be held to as stringent a standard of

> disinterest as judges. "in an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law, *Marshall v. Jerrico*, Inc., 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182(1980).
>
> ....
>
> In a case where a prosecutor represents an interested party, however, the ethics of the legal profession *require* that an interest other than the Government's be taken into account. Given this inherent conflict in roles, there is no need to speculate whether the prosecutor will be subject to extraneous influence. (emphasis in original) (footnote omitted).
>
> ....
>
> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice. A prosecutor of a contempt action who represents the private beneficiary of the court order allegedly violated cannot provide such assurance, for such an attorney is required by the very standards of the profession to serve two masters.

Having established that the same Code of Professional Responsibility relied upon by the Young court governs the practice of law in this state, we are of the opinion that the conflicts of interest and temptations, as outlined in Young, that are faced by an interested prosecutor, are not so remote as to believe that they are unlikely to

occur in this state if the practice of appointing interested special prosecutors continues. This case is an appropriate one to render such an opinion, inasmuch as we approach the issue prospectively, for the defendant in this case has filed not one. But two petitions seeking to have the interested special prosecutor removed and a disinterested special prosecutor appointed.

As a further consideration, in dealing with the issue of appointing interested special prosecutors we should also recognize the existence and effect of judicial canons that govern the conduct of judges. We perceive that for at least two reasons the judicial canons are relevant to this issue. First of all, judges must "strive to enhance and maintain confidence in our legal system," Tenn. S.Ct.R. 10, Preamble, and secondly, because the appointing judge has the responsibility to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Tenn. SCt.R 10. Canon 2.

At the heart of the issue of whether an interested prosecutor should be appointed is the fact that all appointments are controlled by the trial judge. Therefore if public confidence is undermined by the appointment of a special prosecutor with conflicting interests, the judge is under an ethical obligation to refrain from making such an appointment. This would be true even if the judge considered the attorney to be able to properly handle the competing interests. As the Young court stated, "the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created opportunities for conflicts to arise, and created at least the appearance of impropriety." Young, 481 U.S. at 806, (emphasis in original)[7] (footnote omitted). The appointment of an interested special prosecutor presents the public with the appearance of impropriety. As such, we deem the appoinment as contrary to the appearance of

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[7]Tennessee has an unreported case where the private prosecutor allegedly used the threat of criminal contempt charges to attempt to coerce a civil settlement. See State v. Eldridge, No. O1CO195O4-CC-0O106, 1997 WL 230200, at **8 (Tenn. Crim. App. May 7, 1997)

integrity and impartiality which the judiciary must strive to maintain.

The primary interest served by the appointment of opposing counsel as special prosecutor is that of judicial economy. Because the other attorney is already familiar with the facts of the case and the conduct on which the contempt charge is based, the proceedings do not have to be suspended until an outside attorney is "brought up to speed" on the case. Again, the language from Young is helpful:

> The potential for misconduct that is created by the appointment of an interested prosecutor is not outweighed by the fact that counsel for the beneficiary of the court order may often be most familiar with the allegedly contumacious conduct. That familiarity may be put to use in assisting a disinterested prosecutor in pursuing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution. Id. at n.17(emphasis in original).

The interest of judicial economy should not be placed above the interest of judicial integrity. Other jurisdictions have taken a similar stance against the appointment of interested special prosecutors for ethical reasons. See Department of Sec. Serv. v. Montero, 758 P.2d 690, 693 (Haw. Ct. App. 1988), State ex rel. Koppers v. International Union of Oil, Chem. & Atomic Workers, 298 S.E.2d 827, 830 (W. Va. 1982). We are aware of only two twentieth century cases holding unequivocally that a private prosecutor who also represents plaintiffs in a civil action arising out of the same proceeding presents no inherent due process or ethical problems. Hopkins v. State, 429 So.2d 1146, 1154(Ala. Crim. App. 1983); Marcisz v. Marcisz, 357 N.E.2d 477 (Ill. 1976).

In sum, we hold that counsel for a party that is the benefciary of a court order may not be appointed as prosecutor in a criminal contempt action alleging a violation of that order. The judgment of the trial court below denying plaintiffs petition to disqualify private counsel is reversed. This cause is remanded to the trial court for further proceedings not inconsistent with this opinion. Costs in this

cause on appeal are taxed to defendant for which execution may issue if necessary.

ENTER: Mar 20 1998

"s/S. Tomlin, Sr."
TOMLIN, SR. J.

"s/ P.J.W.S. Crawford"
CRAWFORD, P.J. W.S. (CONCURS)

"s/J. Farmer"
FARMER, J. (CONCURS)

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

JENNIFER O. WILSON,

Plaintiff,

V.

LARRY ARNOLD WILSON,

Defendant.

Davidson Circuit No. 96D-1850
C.A. No. 01A01-9704-CV-00152

FILED
MAR 20 1998
Clerk of the Courts

JUDGMENT

This cause came to be heard by the court and was duly considered. **IT IS NOW ORDERED** that the judgment of the trial court below denying plaintiffs petition to disqualify private counsel is reversed. In sum, we hold that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a criminal contempt action alleging a violation of that order. This cause is remanded to the trial court for further proceedings not inconsistent with this opinion. Costs in this cause on appeal are taxed to defendant for which execution may issue if necessary.

ENTER: Mar 20 1998

"s/ J. Tomlin, Sr."
TOMLIN, SR. J.

"s/ P.J.W.S. Crawford"
CRAWFORD, P.J.W.S. (CONCURS)

"S/ J. Farmer"
FARMER, J. (CONCURS)

APPENDIX C - TENNESSEE SUPREME COURT ORDER OF 1/19/99- DENYING PETITION TO REHEAR

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

FILED
JAN 19 1999
Clerk of the Courts

JENNIFER O. WILSON, Plaintiff/Appellee,	]]	NOT FOR PUBLICATION
LARRY ARNOLD WILSON, Defendant/Appellant,	]]	

S.CT. NO. 01SO1-9807CV-OO 130

ORDER ON PETITION FOR REHEARING

The plaintiff-appellee, Jennifer O. Wilson, has filed a petition for rehearing in this case which the Court has considered and is of the opinion that the petition should be denied. The members of the Court adhere to the positions stated in the original opinions filed in this cause.

PER CURIAM

APPENDIX D - TENNESSEE SUPREME COURT ORDER OF 1/14/99 -REQUIRING NOTIFICATION OF FILING CERTIORARI PETITION

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

FILED
JAN 14 1999
Clerk of the Courts

JENNIFER O. WILSON, Appellee,	)	APPEAL NO. 01SO1-98O7-CV-00130
v.	)	
LARRY ARNOLD WILSON, Appellant,	)	DAVIDSON CIRCUIT NO. 96D-1850

ORDER

Appellee, Jennifer Oakley, filed a motion on January 8, 1999 to recall mandate and to stay further issuance of mandate pending disposition of the petition for rehearing filed on December 31, 1998 and, in the event the petition is denied, pending the filing and disposition of a petition for writ of certiorari to the United States Supreme Court.

It is the opinion of this Court that mandate was improvidently issued by the Clerk's office on January 7, 1999. Further, it is apparent from the Clerk' s case history that it recalled mandate on January 11, 1999 upon recognizing its mistake. Thus, it is the opinion of this Court the motion to recall mandate should be denied as moot. It is further the opinion of this Court that the motion to stay further issuance of mandate should be granted. See Tenn. R App. P. 42(c).

Therefore, it is hereby ordered that the motion to recall mandate shall be denied as moot. It is further ordered that the motion to stay further issuance of mandate shall be granted. The Clerk shall stay issuance of mandate pending disposition of the petition for rehearing filed on December 31, 1998 and, in the event the petition is denied, pending the filing and disposition of a petition for writ of certiorari to the United States Supreme Court. Counsel for Appellee shall file with the Appellate Court Clerk a notice of either the filing of a petition for writ of certiorari or of Appellee' s election not to file a petition for writ of certiorari.

For the Court:

"s/ Frank F. Drowota"
Justice Frank F. Drowota, III

APPENDIX E - TRIAL COURT ORDER OF 10/21/96 - REQUIRING NOTICE OF CONSTITUTIONAL RIGHTS

IN THE FOURTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

AT NASHVILLE

FILED
96 OCT 21 PM 1:08
Richard C. Rooker, Clerk

JENNIFER O. WILSON]
]
Plaintiff,]
]
vs.]
] NO. 96D-1850
LARRY ARNOLD WILSON,]

Defendant.

ORDER

This cause came on to be heard before the Honorable Muriel Robinson, Judge of the Fourth Circuit Court for Davidson County, Tennessee, on the 10th day of October, 1996, on the petition for contempt filed by Defendant/Petitioner, LARRY ARNOLD WILSON, and it appearing to the Court that the petition for contempt was deficient and failed to recite the statutory grounds relied upon or include the Notice of Constitutional Rights that the Respondent, JENNIFER O. WILSON, is entitled to. From all of which the Court continued this matter and granted the Petitioner, LARRY ARNOLD WILSON, permission to file an amended and supplemental petition in this cause.

It is therefore ORDERED, ADJUDGED and DECREED that this cause be and is hereby continued and LARRY ARNOLD

WILSON is granted permission to file an amended and supplemental petition in this cause.

ENTERED this 21ST day of October, 1996.

"s/ Muriel Robinson"
MURIEL ROBINSON, JUDGE

APPROVED FOR ENTRY:

"s/Earl J Porter, Jr."
EARL J. PORTER, JR., #2530
Attorney for LARRY ARNOLD WILSON
214 Third Avenue North
P.O. Box 190638
Nashville, TN 37219-0638
(615) 244-2070

APPENDIX F - TRIAL COURT ORDER OF 2/21/97 - DENYING RECUSAL

IN THE FOURTH CIRCUIT COURT FOR TENNESSEE
20TH JUDICIAL DISTRICT
AT NASHVILLE

FILED
97 Feb PM 4:33
Clerk of the Courts

JENNIFER O. WILSON	]	
	]	
Plaintiff/Counterdefendant,	]	
Respondent/Counterpetitioner	]	
	]	
VS.	]	No. 96D-1850
	]	
LARRY ARNOLD WILSON	]	
	]	
Defendant/Counterplaintiff	]	
Petitioner/Counterrespondent.	]	

ORDER DENYING RESPONDENT'S MOTION TO RECUSE

This cause came on to be heard on the 10th day of January, 1997 before the Honorable Muriel Robinson, Judge of the Fourth Circuit Court for Tennessee, 20th Judicial District upon the Motion of the Respondent to Recuse. After denial of said motion, the Court entertained an oral motion by Respondent for permission to appeal the decision of the Court pursuant to Tenn. R. App. P. 9(b) which was also denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Respondent's Motion to Recuse is denied.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Respondent's oral motion for permission of the Trial Court to appeal this matter to the Court of Appeals is denied.

Entered this 21st day of February, 1997.

"s/ Muriel Robinson"
JUDGE

APPROVED FOR ENTRY:

"s/ Jim Sanderson"
James T.'Jim' Sanderson
101 Market Street
P.O. Box 331
Bolivar, Tennessee 38008
(901) 658-4866
Supreme Court Reg. No. 6953

"S/ Clark Shaw"
Clark Lee Shaw
2525 Lebanon Road
Nashville, TN 37214
(615) 883-0705
Supreme Court Reg. No. 10836

"/s John Herbison""
John Herbison
2016 Eighth Avenue, South
Nashville, Tennessee 37204
(615)297-5900
Supreme Court Peg. No. 12659

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Order has been mailed to by the United States Mail, postage prepaid, to Earl J. Porter, Jr. at 214 Third Avenue, North, Nashville, Tennessee 37201 this 7th day of February, 1997.

"s/ Clark Shaw"
Clark Lee Shaw

C:\WS2000\1997\1JAN/97\0AKLEY

APPENDIX G - TRIAL COURT ORDER OF 2/21/97 - DENYING DISQUALIFICATION OF PRIVATE ATTORNEY

IN THE FOURTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

FILED
97 FEB 21 PM 4:33

JENNIFER O. WILSON

vs NO. 96D-1850

LARRY ARNOLD WILSON

ORDER

This cause came on for hearing on the IOth day of January, 1997 in the Fourth Circuit Court for Davidson County, Tennessee, Judge Muriel Robinson, Presiding, upon motion of plaintiff and counter-defendant, Jennifer O. Wilson, to disqualify private counsel for defendant and counter-plaintiff, Larry Arnold Wilson, from prosecution of a petition for criminal contempt against the said Jennifer O. Wilson which arises out of a divorce matter.

It is respectfully **ORDERED** and **DECREED** said motion is denied.

Upon oral motion, the plaintiff and counter-defendant, Jennifer O. Wilson, prayed for an interlocutory appeal of this ruling, which the Court was pleased to grant.

It is further **ORDERED** in view of the appeal these two pending contempt petitions filed by the parties are hereby stayed pending the appeal.

ENTERED this the 21st day of February, 1997.

"/S Muriel Robinson"
MURIEL ROBINSON, JUDGE

cc. Honorable James T. "Jim" Sanderson
Attorney-at-Law
101 Market Street
P.O. Box 331
Bolivar, Tennessee 38008

APPENDIX H - TENNESSEE COURT OF APPEALS ORDER OF 4/8/97 - GRANTING INTERLOCUTORY APPEAL

IN THE COURT OF APPEALS OF TENNESSEE MIDDLE SECTION AT NASHVILLE

FILED
APR 08 1997
Clerk of the Courts

JENNIFER O. WILSON,	)	
	)	
Plaintiff/Counter Defendant,	)	
	)	
	)	Davicson Circuit
	)	No. 96D-1850
	)	
	)	
	)	Appeal No.
	)	01A01-9704-CV-00152
	)	
LARRY ARNOLD WILSON,	)	
	)	
Defendant/Counter Plainriff.	)	

ORDER

This Tenn. R. App. P. 9 application for an interlocutory appeal involves two petitions for criminal contempt arising out of a divorce proceeding in the Fourth Circuit Court for Davidson County. Prior to the hearing on the contempt petition, the wife's lawyer moved to disqualify the husband's lawyer from prosecuting the criminal contempt petition. The trial court entered an order on February 21,

1997, denying the motion, granting an interlocutory appeal from its decision, and staying the contempt proceedings pending the outcome of the interlocutory appeal. Despite the confusion concerning the scope and basis of the trial court's decision to grant an interlocutory appeal, we have determined that an interlocutory appeal[8] is appropriate in this case.

It is, therefore, ordered that the application for interlocutory appeal be and is hereby granted on the following question: Whether a lawyer representing a party in a civil proceeding may prosecute a petition for criminal contempt based on conduct arising out of civil proceeding.

It is further ordered that clerk of the trial court promptly prepare and transmit to this court a record providing a full, accurate, and complete account of all the proceedings in the trial court with regard to the petitions for contempt, including, but not limited to, all pleadings filed in the trial court. The case will proceed in accordance with the Tennessee Rules of Appellate Procedure.

It is further ordered that copies of this order be mailed to the Tennessee Bar Association, the Tennessee District Attorneys General Conference, and the Board of Professional Responsibility and that these parties are invited to file amicus curiae briefs and to otherwise participate in this appeal in accordance with Tenn. R. App. P. 31.

---

[8]During a later hearing, the trial court commented that it had granted an interlocutory appeal on the question of whether the parties were entitled to a juy trial on the contempt petitions. This statement is contrary to the February 21, 1997 order, and in the absense of any other order granting an interlocutory appeal, we view the February 21, 1997 order as controlling on the issues sought to be raised on this interlocutory appeal. The application for permission to appeal is limited to the use of private counsel to prosecute criminal contempt actions, thus the issue of the right to a jury trial in this criminal contempt proceeding is not properly before us.

ENTER, this 8th day of April, 1997.

"S/ Henry F. Todd"
HENRY F. TODD, P.J., M.S.

"s/ Ben H. Cantrell"
BEN H. CANTRELL, JUDGE

"s/ William C. Koch"
WILLIAM C. KOCH, JR., JUDGE

APPENDIX I - TENNESSEE COURT OF APPEALS ORDER OF 4/21/97 - GRANTING EXTRAORDINARY APPEAL

IN THE COURT OF APPEALS OF TENNESSEE MIDDLE SECTION AT NASHVILLE

FILED
APR 21 1997
Clerk of the Courts

JENNIFER O. WILSON,

Plaintiff/Counter-defendant
and Applicant for
Extraordinary Appeal,

Vs.

Appeal No.
01-A-01-9704-CV-001 81
Davidson Circuit
No. 96D-1850

LARRY ARNOLD WILSON,
Defendant/Counter-plaintiff
and Respondent,

ORDER

Jennifer O. Wilson has filed an application for an extraordinary appeal in accordance with Tenn. R. App. P. 10 requesting appellate review of the trial court's April 18, 1997 decision denying her motion to disqualify the lawyer representing Larry A. Wilson in the divorce proceeding from prosecuting an action for criminal contempt based on a petition filed on February 28, 1997. On April 8, 1997, this court granted a Tenn. R. App. Appeal on the identical question arising from a different contempt petition filed in the same case. Based on the application and the transcript of the hearings before the trial court on April 18, 1997, we have determined that the application is well-taken.

It is, therefore, ordered that the application for extraordinary appeal be and is hereby granted and that the contempt proceedings scheduled to be heard on April 21, 1997 be and are hereby stayed pending the appeal.

It is further ordered that this appeal be and is hereby consolidated with the appeal in *Wilson v. Wilson*, App. No. 01A01-9704-CV-001 52.

It is, therefore, ordered that the clerk of the trial court promptly prepare and transmit to this court a record providing a full, accuratee, and complete account of all the proceedings in the trial court with regard to the February 28, 1997 petition for contempt. The case will proceed in accordance with the Tennessee Rules of Appellate Procedure.

ENTER this 21 day ofApril, 1997.

"/s /Henry F. Todd"
Henry F. Todd, Presiding Judge

"s/ Ben H. Cantrell"
Ben H. Cantrell, Judge

"s/ William C. Koch"
William C. Koch, Jr. Judge